TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~486.~~ 66

THE COUNTY OF PENDLETON, PLAINTIFF IN ERROR,

vs.

HENRY AMY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED SEPTEMBER 26, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 486.

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1 United States Supreme Court.

And now comes the said plaintiff in error, The County of Pendleton, by its attorneys, &c., and for error herein assigns the following, to wit:

1. The court erred to the prejudice of this plaintiff in adjudging the law to be for the said defendant in error on the demurrer to the first plea.

2. The court erred to the prejudice of this plaintiff in adjudging the law to be for the defendant in error on the demurrer to the second plea.

3. The court erred to the prejudice of this plaintiff in adjudging the law to be for the defendant in error on the demurrer to the third plea.

4. The court erred to the prejudice of plaintiff in adjudging the law to be for the defendant in error on the demurrer to the fourth plea.

2 5. The court erred to the prejudice of this plaintiff in rendering said judgment for $13,009 85, with interest thereon from Oct. 15, 1868.

Wherefore for the errors aforesaid, as well as other errors in the said record and proceedings, the plaintiff prays that the said judgment may be reversed.

MENZIES & FURBER,
CARLISLE & IRELAND,
For Pl'fft in Error.

3 UNITED STATES OF AMERICA,
District of Kentucky, ss:

To Henry Amy, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, District of Columbia, on the 1st Monday in December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the said district of Kentucky, wherein Pendleton County, Kentucky, are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 22nd day of June, in the year of our Lord 1870, and of our independence the 94th.

[SEAL.] BLAND BALLARD.

4 Executed by serving a copy of the within on H. Meyers, att'y for H. Amy, at Covington, June 22, 1870, at 4 o'clock p. m.

ELI H. MURRAY,
U. S. M. K. D.,
By JAMES BEGGS,
Deputy.

5 UNITED STATES OF AMERICA,
District of Kentucky, ss:

The President of the United States of America to the judge of the circuit court of the United States for the Kentucky district, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you between Henry Amy, plaintiffs, and The County of Pendleton, a manifest

error hath happened, to the great damage of The County of Pendleton, as by their complaint appears, and it being fit that the error, if any there hath been, should oe duly corrected, and full and speedy justice done to the part aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the Supreme Court in the city of Washington, on the first day of our next December term in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of said court, at Covington, in said district, this 22nd day of June, A. D. 1870, and of the independence of the United States the ninety-fourth.

[SEAL.] J. M. BLACKBURN,
C. C. C. K. D.

A certified copy of this writ of error left on file in the records of my office.

J. M. BLACKBURN,
C. C. C. K. D.

6 Proceedings of the circuit court of the United States of America for the district of Kentucky, at the regular term, begun and held at the federal court hall, in the city of Covington, on the day of April, 1869: Present, the Hon. Bland Ballard, judge.

HENRY AMY
against
PENDLETON COUNTY.

Be it remembered that heretofore, to wit, on the 6th day of , 1869, came the plaintiff, by his attorney, H. Myers, esq., and filed his declaration herein; which is in the following words and figures, to wit:

United States circuit court, Kentucky district, at Covington.

Declaration.

HENRY AMY, PL'IFF,
ag'st
PENDLETON COUNTY, DEF'T.

Henry Amy, a citizen of the State of New York, complains of the County of Pendleton, a municipal corporation created by an act
7 of the general assembly of Kentucky, a citizen of Kentucky, of a plea that it render unto plaintiff the sum of $13,009 85, which it owes to and unjustly detains from him.

For that whereas, heretofore, to wit, on the 15th day of October, 1853, the said County of Pendleton, acting under and by virtue of an authority conferred on it by an act of the general assembly of the Commonwealth of Kentucky, approved February 27, 1849, entitled An act to amend the charter of the Licking & Lexington Railroad Com-

pany, and of another act of the general assembly, approved March 4, 1850, entitled An act to amend the charter of the Covington & Lexington Railroad Company, did make its 50 bonds in writing, each sealed with its corporate seal and signed by W'm C. Naylor, presiding judge of its county court, and countersigned by Matthew Mullins, clerk of said county court, and by the terms of each of said bonds the said county acknowledged itself to be indebted unto the Covington and Lexington Railroad Company, (a corporation created by the acts aforesaid,) or unto the bearer of the bonds, in the sum of $1,000, payable at
8 *at* the Bank of America, in the city and State of New York, 30 years thereafter, with interest of at the rate of six per centum per annum, payable semi-annually at the aforesaid bank, to wit, on the 15th day of April and October in each year, and for each installment of interest to mature on each of said bonds an interest warrant was annexed to the bond, whereby and by the terms of each warrant the said county undertook and faithfully promised to pay unto the bearer the said sum of $30 at the aforesaid bank, on the respective days when said interest should mature.

And plaintiff avers that afterwards, to wit, on the 16th day of October, 1853, the said county court of Pendleton did tender the aforesaid 50 bonds, with the coupons thereto annexed, unto the aforesaid Covington and Lexington Railroad Company, in payment for $50,000 of the capital stock of said company theretofore subscribed by said county on the books of said company, under and by virtue of an authority conferred on it to make said subscription by the acts of the general assembly aforesaid.

9 And plaintiff avers that the said 50 bonds, with the coupons thereunto annexed, in full payment and discharge of the said sum of $50,000 so as aforesaid subscribed by said county to its capital stock, and did issue and deliver unto said county a certificate for the said 50 shares of its capital stock, which the said county accepted and received, and of which she is still the owner.

And plaintiff further avers that the said railroad company did afterwards, to wit, on the day of October, 1863, *did* vend and sell the aforesaid 50 bonds, with the coupons thereto annexed, unto divers persons to the plaintiff unknown, and received from them a large sum of money, to wit, $50,000, in payment therefor, and did then and there deliver the aforesaid 50 bonds, with the coupons aforesaid, unto the said purchaser, and plaintiff has since become the owner and holder and bearer of all of said 50 bonds, and of all of the coupons annexed thereto which remain unpaid.

And plaintiff avers that, though often requested so to do, the said defendant did wholly neglect and refuse to place or have any
10 money whatsoever at the said Bank of America to pay such of said interest warrants as matured on the 15tll of October, 1864, nor has it placed any funds or money at said bank at any time since that day to pay said coupons, or any coupons or interest warrants which have matured since that day, whereby a large number of plaintiff's said coupons, to wit, 384 coupons of $30 each, amounting to $11,520, with the interest which has accrued thereon, after the rate of 7 per centum per annum, according to the laws of the said State of New York, amounting to the sum of $1,489 85, (particulars of which are shown on account hereto annexed,) hath fallen due the plaintiff.

Yet the said defendant, though often requested to pay the said sum of $13,009 85 above demanded, hath not as yet paid the sum, nor any part thereof, to the said plaintiff, but it to do this hath wholly neglected

and refused, and still doth refuse, to the damage of the said plaintiff $1,500, and therefor he brings this suit.

STEVENSON AND MYERS,
For Plaintiffs.

11 The following is the account referred to in the foregoing declaration:

The County of Pendleton in acc't with Henry Amy.

1864.		
Oct. 15.	To 26 coupons of $30 each	$780 00
	Int. to Oct. 15, 1868, 4 years, @ 7 per cent	218 43
1865.		
April 15.	To 43 coupons of $30 each	1,290 00
	Int. to Oct. 15, 1868, 3½ years, @ 7 p'r cent	316 05
Oct. 15.	To 43 coupons of $30 each	1,290 00
	Int. to Oct. 15, '68, 3 years, @ 7 p'r cent	270 00
1866.		
April 15.	To 43 coupons of $30 each	1,290 00
	Int. to Oct. 15, '68, 2½ years, @ 7 p'r cent	225 75
Oct. 15.	To 43 coupons of $30 each	1,290 00
	Int. to Oct. 15, '68, 2 years, @ 7 per cent	180 60
1867.		
April 15.	To 43 coupons of $30 each	1,290 00
	Int. to Oct. 15, '68, 1½ years, @ 7 per cent	135 43
Oct.	To 43 coupons of $30 each	1,290 00
	Int. to Oct. 15, '68, 1 year, 7 per cent	90 30
1868.		
Apr. 15.	To 50 coupons of $30 each	1,500 00
	Int. to Oct. 15, '68, 6 months, @ 7 per cent	52 50
Oct. 15.	To 50 coupons of $30 each	1,500 00
	Total to Oct. 15, 1868	$13,009 85

Interest computed on the above to Oct. 15, 1868.

12 And afterwards, to wit, April 20, 1869, the following order was made:

Order.

This day came the defendant, by attorney, J. N. Furber, esq., and filed pleas Nos. 1, 2, 3, and 4 herein.

The following are the pleas referred to:

United States circuit court, Kentucky district, at Covington.

1st. And now comes the said defendant, The County of Pendleton, by its attorney, Menzies and Furber, Ireland & Carlisle, and defends the wrong and injury, &c., and says actio non, because it avers that the said plaintiff is not now, nor was it at the time of the filing of his said declaration herein, the owner, holder, or bearer of the said alleged bonds and coupons, or of any or either of them, as in said declaration mentioned; and of this the said defendant puts itself upon the country.

2. And for further plea in this behalf, the said defendant says actio non, because it avers that, at the time of filing of said declara-
13 tion herein, the said alleged bonds & coupons were, and each of them was, and they all still are, the property of one Augustus

Robbins, a citizen of the State of Kentucky, and the same were not, and are not now, the property of any other person or persons; and this the defendant is ready to verify.

3rd. And the said defendant, for further plea in this behalf, says actio non, because although the legislature of Kentucky, by the 8th section of an act approved February 27, 1849, authorized the county of Pendleton to subscribe to the stock of the Covington and Lexington Railroad Company not exceeding one hundred thousand dollars, and to borrow money to pay the same, provided the real estate holders residing in the county shall by a majority so vote, at such times as the county court of the county may appoint; the stock subscribed, or the money borrowed, to be a charge on the real estate, to be determined by assignment on realty made by the county court. The question of subscribing stock, or of borrowing money to pay the same, never was sub-
14 mitted to the real estate holders residing in the county of Pendleton, to be determined by vote of a majority of them, as authorized and required by said act, and before any stock had been subscribed by or for said county, or any money borrowed to pay the same, as authorized by said act of February, 1849. The legislature of Kentucky, by the 1st section of an act approved on the 4th of March, 1850, declared that, for the purpose of paying the subscriptions of stock in said company which certain counties, Pendleton being one, are authorized to make, the county courts thereof shall levy and collect a tax on the taxable property within the jurisdiction of each, not exceeding one-half of one per cent. per annum for five years, to be collected as revenue tax is collected; provided that, before a subscription shall be made and the tax levied, the question of levying the tax shall be submitted to the voters of the county, and if a majority of the votes so cast shall be in favor of the tax, the same shall be levied. And by the 3rd section it is enacted that the county court of the counties shall appoint a day for the vote to be taken, and shall give sufficient public notice thereof, and when a majority of the voters cast shall be in favor of a subscription, the
15 court shall immediately subscribe the same, in accordance with the vote. And by an act approved on the 6th of March, 1850, the 1st section of the act of the 4th March, 1850, is again enacted, without any additional section or provision, and without any other substantial appearance, except in reducing the time for what the tax was to be levied and increasing the tax to one per cent. on the $100 worth of property, and the defendant says that no authority was given by either of the two acts of March, 1850, to the courts of Pendleton or the presiding judge thereof to subscribe stock in said company but on condition that the question of making the subscription and levying the tax authorized by said acts should be first submitted to the voters of the county, and that a majority of the votes cast should be in favor of the tax or subscription. The question on the tax being thus made to determine the question of subscribing stock, and the defendant avers that the question whether the tax or the subscription authorized by these two acts, or whether any tax for the payment of a subscription of stock in said company shall be imposed in the county, never has been
16 submitted to, nor voted on by, the voters of Pendleton County, in conformity with either of said acts of $1850, or under the authority of any act of the legislature of Kentucky, and in conformity therewith; and that there is and has been no other provission of any statute of the State of Kentucky, except those of 1849 and 1850 above referred to, which authorized the county of Pendleton, or any one for it, to subscribe stock for it in said company, or to levy a tax for its payment, or to

borrow money, or to issue bonds and coupons for the payment of any subscriptions of stock in said company; and of this the defendant put itself upon the country.

MENZIES AND FURBER,
IRELAND & CARLISLE,
Att'ys for Def'ts.

United States circuit court, Kentucky district, at Covington.

And now comes the said defendant, The County of Pendleton, by its attorneys, Menzies & Furber and Ireland and Carlisle, and defends this wrong and injury, &c., and says actio non, because it avers that it did not sign, seal, or deliver the said alleged and coupons, or any one of them, to the said Covington & Lexington Railroad Company,
17 or to any person or corporation, as in the said declaration alleged, nor did it authorize and empower the said W'm C. Naylor and Mathew Mullins, or either of them, to sign, seal, and deliver the same, or any one of them, as in said declaration alleged, and so the said defendant says that the said alleged acts and coupons are not its acts and deeds; and of this it put itself upon the country.

MENZIES AND FURBER, and
IRELAND & CARLISLE,
Att'ys for Defendants.

STATE OF KENTUCKY, *Pendleton County:*

John Wheeler says that the statements in the foregoing pleas are true.

JOHN WHEELER,
Justice of the Peace, Pendleton County, Ky.

Sworn to before me by John Wheeler, this day of April, 1869, as witness my hand and seal of the court, of which the undersigned is clerk.

[L. S.] JNO. B. APPLEGATE, *Clerk.*

18 Afterwards, to wit, April 22nd, the following order was made:

Order.

"This day came the plaintiff, by his attorney, H. Myers, esq., and filed demurrer to the plea herein."

Demurrer referred to is as follows:

Demurrer.

HENRY AMY
vs.
PENDLETON CO. } Demurrer.

And the said plaintiff, by his att'ys, comes and says as to the said plea of the said defendant thirdly above pleaded, that the matters and things in the said plea set forth in manner and form as they are, by the said defendant therein pleaded, are not sufficient in law to bar or preclude the plaintiff of his said action thereof against the said defendant; and this he is ready to very. Wherefore, &c.

STEPHENSON & MYERS.

And the said defendant joins in the said demurrer & prays, &c.

CARLISLE, *Att'y.*

Afterwards, to wit, April 24, 1869, the following order was made:

Order.

19 This day came the plaintiff, by his attorney, H. Myers, esq., came also the defendants, by attorney, J. N. Furber, esq. The law arising upon plaintiff's demurrer to defendant's plea, was argued by counsel. Whereupon the court being advised is of opinion the law is for the plaintiff, and said demurrer is sustained.

Afterwards, to wit, the April 29th, A. D. 1869, the following order was made:

Order.

"This day came the plaintiff, by his attorney, H. Myers, esq., and filed demurrers to 1st, 2nd, & 4th pleas of defendant."

The following is the demurrer:

Demurrer.

HENRY AMY *vs.* PENDLETON COUNTY. } Demurrer.

And the said plaintiff, by Stevenson and Myers, his attorneys, as to the plea of the said defendant firstly above pleaded, says that it is not sufficient in law, and this he is ready to verify; and the said def't joins in said demurrer.

CARLISLE, *Att'y.*

And as to the plea of the defendant secondly above pleaded, he says that it is not sufficient in law, and this he is ready to verify;
20 and the said defendant joins in said demurrer.

CARLISLE, *Att'y.*

And as to the plea fourthly above pleaded, he says that it is not sufficient in law; and this he is ready to verify.

STEVENSON & MYERS.

And the said defendant joins in the said demurrer & prays, &c.

CARLISLE, *Att'y.*

Afterwards, to wit, April 30th, 1869, the following order was made, to wit:

Order.

The court now being sufficiently advised, the demurrer to the 1st, 2nd, 3d, & 4th pleas is sustained; to which ruling of the court defendant excepts.

It is therefore considered by the court that the plaintiff, Henry Amy, recover of the defendant, The County of Pendleton, the sum of thirteen thousand and nine & $\frac{85}{100}$ dollars, ($13,009 $\frac{95}{100}$,) with interest thereon at the rate of 6 per cent. per annum, from the 15th day of October, 1868, till paid, and also his costs in this behalf expended.

The following is the bond for costs given by The County of Pendleton, to wit:

21 Know all men by these presents that we, Pendleton County,

A. Robbins, John Wheeler, & J. M. Curry, and their successors in the cause, in said offices respectively, in the sum of one thousand dollars, to be paid to the said Henry Amy; to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents, sealed with our seal this 5th day of April, 1870.

Whereas the said Pendleton County of the State of Kentucky has appealed a suit from the circuit court of the United States for the Kentucky district, in the city of Covington, to the Supreme Court of the United States, and has offered the said A. Robbins, John Wheeler, & J. M. Curry, of the county of Pendleton, in the Commonwealth of Kentucky, to be bound with them in this bond, for all costs in this suit of every description that may be incurred:

Now, the condition of the above obligation is such, that if the above-bound Pendleton County, A. Robbins, John Wheeler, & J. M.
22 Curry, or either of them, shall well and truly pay to the said Henry Amy and to the clerk and marshal of said Supreme Court, and to their successors, and to all other officers and agents of said court, and to the witnesses of said Pendleton County severally, all costs of every kind whatever that may be incurred in said suit, with which the said Pendleton County shall be legally chargeable, then the above obligation to be void, or else to remain in full force and virtue, and the undersigned subject to the summary process of the court for the enforcement thereof.

A. ROBBINS, [SEAL.]
JOHN WHEELER, [SEAL.]
J. M. CURRY, [SEAL.]
By J. M. BLACKBURN,
Their Attorney in fact.

The following is the power of attorney given for signing said bond, viz:

Power of attorney.

We hereby appoint and constitute A. J. Ballard, of Louisville, Kentucky, or J. M. Blackburn, of Covington, Kentucky, our attorney in fact to sign our names to any bond for costs or other purposes, (not however to supersede the judgment,) that may be required of
23 appellants in its prosecution of its appeal in its case of Henry Amy vs. Pendleton County in the Supreme Court of the United States, and we hereby ratify and confirm any and all acts done by our said attorney in these premises.

Given under our hands this 5th day of April, 1870.

A. ROBBINS.
JOHN WHEELER.
J. M. CURRY.

[Revenue stamp.]

STATE OF KENTUCKY, *Pendleton County, set:*

I, John B. Applegate, clerk of the county court for the county aforesaid, do certify that this power of attorney from A. Robbins, John Wheeler, and John M. Curry to A. J. Ballard or J. M. Blackburn was this day produced to me in my office, and acknowledged by the said A. Robbins, John Wheeler, and John M. Curry to be their act and deed, for the uses and purposes therein mentioned; and I further certify that the said Robbins, Wheeler, and Curry are possessed of real and

24 personal property in their own right and title to the value of one hundred thousand dollars.

Given under my hand and seal at office in Falmouth, Kentucky, this 5th day of April, 1870.

[L. S.] JOHN B. APPLEGATE,
Clerk Pendleton County Court.

DISTRICT OF KENTUCKY:

I, James M. Blackburn, clerk of the circuit court of the United States for the district of Kentucky, hereby certify that the foregoing 19 pages, this included, contain a true and complete transcript of the record of the proceedings had in the court in the suit wherein Henry Amy was plaintiff, and The County of Pendleton was defendant, down to and including the judgment last entry of the action of the court in the cause, as the same remains on record in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of this court this 22nd day of September, A. D. 1870.

[SEAL.] J. M. BLACKBURN,
C. C. C. K. D.

(Indorsed:) Henry Amy vs. Pendleton County. Transcript of record.

(Indorsement on cover:) No. 486. The County of Pendleton, plaintiff in error, vs. Henry Amy. Kentucky C. C. U. S.
Filed 26th September, 1870.

Supreme Court of the United States.

DECEMBER TERM, 1871.

No. 66.

THE COUNTY OF PENDLETON, Plaintiff in Error,

vs.

HENRY AMY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Brief for Plaintiff in Error.

This was an action of debt to recover $13,009 85 claimed to be due on interest-coupons attached to certain bonds alleged to have been issued by the county of Pendleton, Ky., in payment of a subscription to the capital stock of the Covington and Lexington Railroad Company.

The declaration sets forth, in substance, that in the year 1853 said county, acting under an authority conferred by an act of the Legislature of Kentucky, approved March 27, 1849, and by another act of the same Legislature, approved March 4, 1850, made fifty bonds in writing, each sealed with its corporate seal, and signed by Wm. C. Naylor, presiding judge of its county court, countersigned by Matthew Mullins, clerk of said county court, by the terms of each of which bonds the said county acknowledged itself to be indebted to the Covington and Lexington Railroad Company, or bearer, in the sum of $1,000, payable at

the Bank of America, in the city of New York, thirty years thereafter, with interest at the rate of six per centum per annum, payable semi-annually at the aforesaid bank, for each installment whereof an interest warrant was annexed to each bond, whereby the county undertook and faithfully promised to pay to the bearer the sum of $30 at the aforesaid bank on the respective days when said interest should mature; that afterwards the said county court tendered the said bonds, with the coupons thereto annexed, to the said Railroad Company, in payment for $50,000 of the capital stock thereof subscribed by said county under the authority conferred by the acts aforesaid; that [the said Railroad Company thereupon accepted] the said bonds, with the coupons thereto, in full payment of the said sum of $50,000 so as aforesaid subscribed, and issued and delivered to said county a certificate for fifty shares of its capital stock, which the said county accepted and received; that afterwards the said Railroad Company sold the said bonds, with the coupons thereto, to divers persons, &c., and that the plaintiff has since become the owner and holder and bearer of all said bonds, and of all of the coupons annexed thereto which remain yet unpaid. It then avers that, though often requested so to do, the defendant has wholly neglected and refused to place or have any money at said bank to pay such of said interest warrants as matured on, &c., whereby a large number of said coupons hath fallen due to the plaintiff, &c.

Four pleas were put in, the first and second of which, in view of their nature and the character of the other pleas by which they were accompanied, are not materially important to be considered here.

The third plea set up special matter in defence, the substance of which is as follows:

That the Legislature of Kentucky, by the act approved February 27, 1849, authorized the county of Pendleton to subscribe to the stock of the Covington and Lexington Railroad Company, and to borrow money to pay the same; *provided* the real estate holders residing in the county should by a ma-

jority so vote, at such time as the county court of the county might appoint.

That the question of subscribing stock, or of borrowing money to pay the same, never was submitted to the real estate holders residing in said county, to be determined by a vote of a majority of them, as authorized and required by said act.

That before any stock had been subscribed by or for said county, or any money borrowed to pay the same, as authorized by said act, the Legislature of Kentucky, by the first section of an act approved March 4, 1850, declared that, for the purpose of paying the subscriptions of stock in said company which certain counties (Pendleton being one) were authorized to make, the county courts thereof should levy and collect a tax on the taxable property within the jurisdiction of each, &c.; provided that, *before a subscription should be made* and the tax levied, the question of *levying the tax* should be submitted to the voters of the county, &c.; and that by the third section it was enacted that the county court of the counties should appoint a day for the vote to be taken, and give sufficient public notice thereof; and that when a majority of the votes cast should be in favor of *a subscription*, the court should immediately subscribe the same, in accordance with the vote.

That by an act approved March 6, 1850, the first section of the act of March 4, 1850, was again enacted without any additional section or provision, and without any other substantial change, except in reducing the time for which the tax was to be levied, and increasing the percentage of the same.

That no authority was given by either of the two acts of March, 1850, to the courts of Pendleton or to the presiding judge thereof to subscribe stock in said company, except on condition that the question of making the subscription and levying the tax authorized by said acts should be first submitted to voters of the county, and that a majority of the votes cast should be in favor of the tax or subscription, &c.

That the question whether the tax or the subscription authorized by these two acts, or whether any tax for the payment of a

subscription of stock in said company shall be imposed in the county, never has been submitted to, nor voted on, by the voters of Pendleton county, in conformity with either of said acts of 1850, or under the authority of any act of the Legislature of Kentucky and in conformity therewith.

And that there is and has been no other provision of any statute of the State of Kentucky, except those of 1849 and 1850, above referred to, which authorized the county of Pendleton, or any one for it, to subscribe stock in said company, or to levy a tax for its payment, or to borrow money, or to issue bonds and coupons for the payment of any subscriptions of stock in said company.

The fourth plea averred that the defendant, the county of Pendleton, "did not sign, seal, or deliver the said alleged and coupons, or any one of them, to the said Covington & Lexington Railroad Company, or to any person or corporation, as in the said declaration alleged, nor did it authorize and empower the said Wm. C. Naylor and Matthew Mullins, or either of them, to sign, seal, and deliver the same, or any one of them, as in said declaration alleged, and so the defendant says that the said alleged acts and coupons are not its acts and deeds;" concluding to the country.

To each of the above-mentioned pleas the plaintiff demurred, and the demurrers were sustained.

It is submitted that the court below erred in sustaining the demurrers to the 3d and 4th pleas.

POINTS.

I. The third plea, though containing some formal defects, constitutes nevertheless a good defence to the action; for, admitting the facts alleged therein to be true, it shows an entire want of authority in the county court to issue the bonds and coupons mentioned in the declaration, and consequently the absence of any liability on the part of the county to pay the amount claimed.

The authority of the county court to borrow money, as is apparent from the matter pleaded, depended on a condition precedent, namely: that the question of subscribing to the stock and of levying a tax be first submitted to the voters of the county for their determination. Until this was done, the court could not become invested with the authority to borrow nor legally exercise it. Now, the plea avers, and the demurrer admits, that the question of subscribing, &c., was never submitted to a vote, as required by the local statutes. So that the fact established by the pleadings is, not the irregular execution of a power already possessed, but the non-possession or rather non-existence of the power itself.

Negotiability will not validate obligations which are not binding because of a *want of power* to issue them. The term "negotiability" presupposes the existence of an instrument made by a person having *capacity* or *power* to contract in that particular manner.

> Clark *vs.* City of Des Moines, 19 Iowa, 210.
> Gould *vs.* Sterling, 23 N. Y., 464.

Accordingly, instruments made by infants, married women, insane persons, or others without capacity to make binding contracts, gain no additional validity because they may assume the form of negotiable paper; and it is entirely immaterial whether the incapacity or want of power is general, or extends only to the particular act in controversy.

So, in this case, the bonds and coupons having been issued by the county court *without power or authority* so to do, as is shown by the pleadings, the circumstance that they were made negotiable does not give them validity and render them binding upon the county.

II. The doctrine of *estoppel*, which is relied upon by counsel on the other side, will not avail to support the action in this case,

since nothing appears on the face of the declaration which can operate as an estoppel, or of which advantage may be taken as such.

1. Where this doctrine has been applied here in actions of this kind against municipal corporations, it will be found, on examination of the cases, that either the bonds or instruments issued *imported on their face* a compliance with the law conferring the power to issue them, or there appeared subsequent acts on the part of the proper authorities amounting to a ratification; and even then the estoppel has been allowed only in favor of *bona fide* holders for value.

Thus, in Commissioners of Knox County *vs.* Aspinwall, 21 How., 539, the leading case on the subject, the bond imported on its face a compliance with the law under which it was issued, and the court held that the purchaser was not bound to look further.

So in Bissell *vs.* City of Jeffersonville, 24 How., 287, where the common council had authority to issue the bonds on the petition of three-fourths of the legal voters of the city, it appeared upon the face of the bonds themselves that three-fourths of the legal voters of the city had petitioned, &c.

So in Moran *vs.* Commissioners of Miami county, 2 Black, 722, the ruling was: "that as it is declared in the bonds that they were issued by the board, etc., by order or resolution, pursuant to the statute authorizing the county to borrow money, etc., the *bona fide* holders of the bonds, whether so by endorsement or delivery, had a right to infer that the bonds had been lawfully issued," etc; and the court further observed, "We think and adjudge that the recitals in the bonds are conclusive, constituting an estoppel *in pais* upon the defendants in this suit."

In Meyer *vs.* Muscatine, 1 Wall., 384, it appeared on the face of the instrument that "by a vote of the legal electors, etc., at an election held, etc., in accordance with an ordinance of the common council sanctioning the same, that the said city was authorized to borrow, etc., and to issue bonds," etc.

In Van Horshup *vs.* Madison City, 8 Wall., 291, it was held that where the bonds recited on their face that they were issued by virtue of an ordinance of the common council, the city was concluded as to any irregularity that may have existed in the carrying into execution the power granted to issue the bonds; the bonds being in the hands of a *bona fide* holder for value.

In Supervisors *vs.* Schenk, 5 Wall., 772, the bonds were issued irregularly, but the court held them to be validated by subsequent acts of the proper authorities amounting to a ratification, and that the county was thereby estopped from setting up the irregularity. The court also observed (p. 784) that "it is settled law that a negotiable security of a corporation *which upon its face appears to have been duly issued* by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in point of fact issued for a purpose and at a place not authorized by the charter of the corporation."

2. The cases cited in the brief of counsel for defendant in error (page 4) are not all in point, but, so far as applicable, they lead to the same result. They are—

Rogers *vs.* Burlington, 3 Wall., 654. The main point in this case was, whether the city, under its charter, had authority to issue the bonds in question, and the court decided in the affirmative. It differs from the case under consideration in this—that here, by the pleadings, want of authority is admitted, and the question of power is not an open one.

Mercer *vs.* Hackett, 1 Wall., 83. The court, referring to Commissioners of Knox County *vs.* Aspinwall, decided that, when the bonds *on their face* import a compliance with the law under which they were issued, the purchaser is not bound to look further.

Bronson *vs.* La Crosse, 2 Wall., 283. The estoppel here was as between junior mortgagees and the holders of bonds secured by prior mortgage under the circumstances stated, and has no application to the case under consideration.

Wood *vs.* Lawrence, 1 Black, 386. In this case the question was, whether county bonds, properly issued and given in payment of a subscription, having been sold below their par value, contrary to the provision of the act chartering the railroad company, were avoided in the hands of purchasers. Here the court decided simply that the right of a *bona fide* holder to recover was not affected by the fact that the railroad company sold the bonds at a discount, though the charter forbid the sale of them for less than the par value. This, like the case last mentioned, has no application to the matter in hand.

3. It will be observed that the declaration in this case does not allege that the bonds upon their face appeared to have been issued pursuant to authority conferred by law; and whether they really purported to have been so issued is not to be gathered from any part of the record.

Nor does the declaration allege any subsequent acts on the part of the county authorities amounting to a ratification—such as the levying of taxes for the payment of interest, and actually paying the same, for a series of years, etc.—(See Supervisors *vs.* Schenck, *supra.*)

Furthermore, it is not averred therein that the plaintiff is a bona fide holder *for value;* the allegation being simply that he "has since become the owner and holder and bearer of all of said fifty bonds," etc., which of itself does not imply that he acquired them bona fide by purchase for a valuable consideration.

There is, then, nothing in the declaration, nothing in the record, of which advantage can be taken, by way of estoppel, as against the special defence set up in the third plea. Had the plaintiff below intended to rely upon matter of estoppel, as he failed to set it out in his declaration, he should have taken care to plead it in a replication, instead of demurring to the plea mentioned.

III. The fourth plea is a special plea amounting to the general issue, and though bad in form is good in substance.

The averment that the county "did not sign, seal, or deliver, the said alleged and coupons, or any one of them, to the said Covington and Lexington Railroad Company, or to any person or corporation, as in the said declaration alleged, nor did it authorize and empower the said Wm. C. Naylor and Matthew Mullins, or either of them, to sign, seal, and deliver the same, or any one of them, as in said declaration alleged," amounts to nothing more than a plea of *nil debet*, which is the general issue in the form of action in which the suit was brought. In other words, the facts averred, taken together, are *in substance and effect* a denial of the indebtedness, and, if true, constitute a complete bar to the demand.

A plea which is in form special, but amounts to the general issue, is faulty simply because it tends to *prolixity*. The proper method of taking advantage of this fault is not by demurrer, but by motion to set aside the plea and enter the general issue instead of it.

Stephen on Pleading, 421, 422.

The reason of pressing a general issue is not for insufficiency of the plea, but not to make long records when there is no cause, which is matter of discretion, and therefore it is to be moved to the court, and not to be demurred upon.

Warner *vs.* Wainsford, Hob., 127.

The allowance of a general demurrer to the fourth plea was therefore error, whether the objection of the plaintiff below went to the form of the plea or to its sufficiency.

B. H. Bristow,
Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

THE COUNTY OF PENDLETON
vs.
HENRY AMY.
No. 254.

BRIEF FOR THE PLAINTIFF IN ERROR.

To the declaration in this cause, based upon bonds and coupons, the County of Pendleton interposed four pleas, and it complains of the sustaining of demurrers to these pleas.

The first plea shows that Henry Amy was not, at the time of filing his declaration, nor at any time afterwards, the owner, holder, or bearer of the bonds and coupons, or any of them. If this plea is true, Amy had no right to have and maintain the action. He might have made out a *prima facie* case by producing the bonds and coupons; but it was not impossible for the County of Pendleton to overturn the *prima facie* case, and the opportunity ought to have been allowed on a trial of the issue.

The second plea shows, that a citizen of Kentucky was the owner of the bonds and coupons, which the county of Pendleton was ready to verify. This plea ought to have been denied by Amy, because, if the plea was true, he had no right to have and maintain the action.

The third plea is based upon the law of Kentucky, as laid down by the court of appeals of Kentucky, in the case of Bullock *v.* Curry, reported in 2 Metcalfe. There was no authority conferred by law upon the County Court of Pendleton to make the bonds and coupons, nor to subscribe the stock for which the bonds and coupons were issued.

The fourth plea is in substance a plea of *non est factum*, and shows that Naylor and Mullins had no authority to execute the bonds for the County of Pendleton, and it was proper for this plea to conclude to the country.

On every one of these pleas the County of Pendleton had a right to a trial, and we respectfully ask a reversal.

MENZIES & FURBER,
W. Y. FENDALL,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

Winter Term, 1870--71.

THE COUNTY OF PENDLETON, *Plaintiff in Error,*

Against } *From the Kentucky Circuit.*

HENRY AMY, *Defendant in Error.*

BRIEF FOR THE DEFENDANT IN ERROR.

STEVENSON & MYERS,

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L. D. Croninger Print, Corner 5th and Madison Streets, Covington, Ky

Supreme Court of the United States.

Winter Term, 1870--71.

THE COUNTY OF PENDLETON, *Plaintiff in Error,*

Against } *From the Kentucky Circuit.*

HENRY AMY, *Defendant in Error.*

BRIEF FOR THE DEFENDANT IN ERROR.

HENRY AMY brought an action of debt in the lower Court against the County of Pendleton to recover the sum of $13,009 85 claimed to be due him on three hundred and eighty-four coupons, representing the unpaid interest for several years on fifty bonds of $1,000 each, which had been issued by the county in payment of a subscription to the capital stock of the Covington and Lexington Railroad Company, the bonds being payable to bearer, and having been sold by the Railroad Company, and bought by Amy.

The County of Pendleton filed four pleas in bar of the

action, to which the plaintiff demurred, and upon the demurrer the Court gave judgment for the plaintiff for the sum demanded in the declaration. The county brings this writ, and assigns as error that the Court improperly sustained the demurrers.

I.

1. It is submitted that by the first and second pleas, that which is mere matter in abatement is relied on in bar. The pleas do not dispute the making and delivery of the bonds and coupons, or that they are binding and obligatory upon the county, or that they are due or unpaid, or that a cause of action exists against the county thereon, but they simply rely that the action is not brought in the name of the proper party, which is matter in abatement only.

2. Both the first and second pleas are frivolous. They tender issues upon non-issuable points. The declaration sets forth that the bonds and coupons were payable to bearer. The pleas do not dispute this. Therefore the bearer has the right to sue. The bonds and coupons being specialties the proper method of trying the question whether the plaintiff was the bearer or not was to crave oyer. This would have settled the question whether we are the bearer or not by requiring us to produce them to the view of the Court, and of the defendant. If it is said no profert was made, then the proper course was to demur for want of profert.

Stephens on Pleading [69], [405].
Archibald 164.

The question as to whether the plaintiff is the bearer of

the deed sued upon is not a proper one to be made the subject of an issue to the jury. The production of the deed in Court by the plaintiff is conclusive that he is the bearer of it. It would be a waste of time and an idle ceremony to go to the jury upon such a point. It is the province of the Court to settle it upon prayer of oyer.

Stephens on Pleading [*72*].

3. It may be urged that the instruments sued upon are not specialties, but simple contracts, and that of such oyer is not demandable. If this be granted, then *nil debit* was the proper plea, which would put the plaintiff to produce and prove the execution of the paper.

1 Chitty's Pleading [*481*].

Stephens on Pleading [*156*], [*159*].

4. The second plea is bad, for the further reason that it simply sets forth that the coupons are the *property* of one Augustus Robins; whereas the undertaking as set forth in the declaration was to pay the *bearer* of the coupons, and not the person in whom the right of property might be vested. It does not deny that we are the bearer of them, or claim that our holding is tortuous or against the consent of Robins.

II.

1. Of the third plea little need be said. It sets forth matter that is wholly immaterial to the case made by the declaration. It states in substance that the County Court was not authorized *to subscribe to the capital stock* of the railroad company, or *to levy a tax* to pay that subscription

until the question of *subscribing the stock or levying the tax* was submitted to the voters of the county and a majority had voted in favor of it, and says they have not so voted.

But what has all this to do with these fifty negotiable bonds and coupons which the county admits it has issued and sold for their full value, and which are now in the hands of an innocent purchaser? The declaration sets forth specifically that the defendant made the fifty bonds and sealed them with its corporate seal; that by the terms of each bond it agreed to pay the bearer $1,000 thirty years after its date, with interest payable semi-annually, for which coupons were attached, also payable to bearer; that it, *in fact*, subscribed $50,000 to the capital stock of this railroad company, and tendered these bonds in payment of it, and they were received in full payment of the subscription, and that the company immediately sold the bonds for $50,000, which it used in constructing the road, and that plaintiff has since become the owner and bearer of them.

The plea does not traverse any one of the facts set out in the declaration. Nor does it set forth any state of case that amounts to an avoidance of them. The county admits that it made the bonds, sold them and got the money for them. As against an innocent holder for value it is estopped to say that it did this without authority.

Rogers v. *Burlington*, 3 Wallace 654.
Mercer v. *Hackett*, 1 Wallace 83.
Branson v. *La Cross*, 3 Wallace 283.
Wood v. *Lawrence*, 1 Black 386.

2. The plea is bad for another reason. It is a plea by way of confession and avoidance, and yet it tenders issue to the county instead of concluding with a verification, giving us no opportunity to reply to the new matter which it sets forth.

III.

The fourth plea is a very awkward and informal attempt at *non est factum*. It sets out—

(1.) "That it (the County of Pendleton) did not sign, seal or deliver the alleged —— and coupons to the Covington and Lexington Railroad Company, or to any other person or corporation."

(2.) "Nor did it authorize or empower Wm. C. Naylor and Matthew Mullins to sign, seal or deliver the same or any one of them, as in the declaration alleged; *and so* the said alleged *acts* and coupons are not its acts and deeds."

1. This does not amount to the plea of *non est factum*. The gist of such a plea is the direct and positive averment that the instrument sued on is not the party's deed. And this positive and direct averment must be supported by the oath of the party.

Now this plea, in order to ease the conscience of the required oath, goes on to say that the county did not do certain things, nor did the county authorize certain individuals to do those things, and then by way of argument and inference concludes, "and *so* the said defendant says that the said *alleged* acts and coupons are not its acts and deeds."

2. But the plea is bad on other grounds. It purports to be a special plea of *non est factum*. Such a plea must traverse some fact set out in the declaration which is essential to make the instrument the deed of the defendant. The substance of the plea is that the county did not sign nor seal the instruments, nor did it authorize others to do so for it.

Now this is pleading a mere conclusion of law. If the facts set forth in the declaration are true, these bonds and coupons were sealed and delivered by the county. The *facts* as specifically set forth in the declaration, *are not traversed* by the plea. Admitting those facts to be true, the defendant merely puts in its conclusion that it did not execute the bonds and coupons, or authorize it to be done.

It is submitted that the judgment should be affirmed.

JOHN W. STEVENSON
AND HARVEY MYERS,
For Defendant in Error.